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No. 01-1559

In the
Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED BY *AMICI CURIAE*

1. Whether a rule permitting any claim of ineffective assistance of counsel to be brought in a proceeding pursuant to 28 U.S.C. § 2255, with no procedural bar for claims that might have been brought on direct appeal, provides the most "orderly appellate procedure" for resolution of such claims.

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the NAFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL or NAFD, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

represented.

In this case, the NACDL and NAFD are specifically interested because the procedural default rule adopted by the Second Circuit places undue burdens on appellate counsel in criminal cases, creates procedural traps for defendants claiming ineffective assistance of counsel, and does not best serve the interests of counsel charged with ineffectiveness.

SUMMARY OF ARGUMENT

A. The Second Circuit held in this case that petitioner's claim of ineffective assistance of counsel could not be considered on his post-conviction motion under 28 U.S.C. § 2255, the analogue to habeas corpus review for federal prisoners, because petitioner had committed a procedural default for which he could not show an adequate excuse. The alleged default was the failure to present the claim in the first instance on direct appeal, an application of the principle that "habeas corpus will not do service for an appeal," *Sunal v. Large*, 332 U.S. 174, 178 (1947); *Adams v. United States ex rel. McMann*, 317 U.S. 269, 274 (1942). The question that the Circuit's holding poses for this Court is not whether the alleged default was excusable, but the more fundamental question whether there was any default, that is, any violation of a procedural rule, at all. Resolution of this question requires the Court to determine what the procedural rules are in the federal courts for the orderly presentation of ineffective assistance claims on direct appeal and habeas review.

Consideration of the origin and nature of the rule that habeas "will not do service" for an appeal shows that the rule is not absolute, but is a flexible, practical principle based in concerns of "orderly appellate procedure." *Adams*, 317 U.S. at 274; *see Sunal*, 332 U.S. at 180 (not "inflexible" rule). In applying the rule, it is important to note that it is not based on the same policies that underlie rules like "contemporaneous objection" rules at trial, which emphasize the importance of

presenting claims at the earliest practical time. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Davis v. United States*, 411 U.S. 233 (1973). In the trial context, it is important to require counsel to raise issues promptly to permit potential errors to be cured at an early stage, *see Wainwright*, 433 U.S. at 88-90; *Davis*, 411 U.S. at 241, but such considerations are not applicable to appellate defaults.

The procedural rule here is thus not one which necessitates the raising of every claim at the earliest possible moment but one which should encourage claims to be raised in the way best suited to their orderly resolution.

B. The rule applied by the Second Circuit in this case violates important principles of appellate review, places serious practical burdens on participants in the appellate process, raises difficult additional questions for the courts to resolve, and promises no increased efficiency for the courts. Accordingly, *Amici* support adoption of the competing, bright-line rule that any ineffectiveness claim, whether based on the appellate record or not, may be brought for the first time in a proceeding pursuant to 28 U.S.C. § 2255, the proceeding best suited to its resolution. *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (en banc).

The Second Circuit's rule contravenes the usual rule that claims should ordinarily be brought in the trial court in the first instance so that that court, which is most familiar with the proceedings, can make initial findings as a basis for appellate review and so that a full record can be made. Even where a claim is evident on the record, the trial court is in the best position to assess the quality of counsel's performance, and, perhaps even more significantly, to assess the prejudice of any errors that were made by counsel, and it can often make an expeditious factual resolution of the claim, where an appellate court could not.

In addition, *Amici* contend that the Second Circuit's rule

violates the principle that claims should ordinarily be adjudicated on a full record, which includes, in the ineffectiveness context, trial counsel's account of the basis for his actions. *Amici* are organizations whose trial-lawyer members may be subject to ineffectiveness complaints and have a substantial interest in their accurate resolution, since a finding of ineffectiveness may subject them to disciplinary sanctions and the loss of their livelihood. *Amici* contend, therefore, that the federal courts' procedural rules ought to encourage claims being brought in post-conviction proceedings where counsel's basis for acting, or failing to act, in the case can be put on the record, an opportunity that does not fully exist at trial, even if the issue is raised. Accordingly, even if the ineffectiveness claim appears to have been addressed on the record, a defendant should not be punished for bringing the claim in proceedings under § 2255, where counsel will have a full opportunity to respond without the constraints that exist in the midst of trial.

The Second Circuit's rule places serious practical burdens on the participants in the appellate process. Its contours continue, after a decade, to be unclear, and it presents traps for the unwary, and even the wary, litigant. In addition, because of the looming possibility of default, counsel are encouraged to raise claims in the court of appeals, even when they are not properly presented there. Counsel must go through the pointless exercise of raising these claims only to enable the court to engage in the pointless exercise of deciding not to decide them (or worse, to decide them on an inadequate record). The rule also burdens appellate counsel by diverting him from his main task, learning and presenting the trial record, to a secondary task, investigating trial counsel's conduct to determine if there is off-the-record evidence of ineffectiveness. This investigation may well result in depriving appellate counsel of the important cooperation of trial counsel, who may not welcome it. The better rule permits appellate counsel to concentrate on the quintessentially appellate claims in the record and to consider later questions of ineffective assistance.

Should this Court adopt the Second Circuit's rule, there would remain other complicated questions to be resolved. The exact scope of the rule, and the claims it permits to be brought under § 2255, needs clarification. There is a serious question how the rule should apply when the defendant has an ineffectiveness claim, or claims, based on multiple aspects of counsel's performance, some of which appear on the record and some of which do not. And other aspects of the rule, such as who will be treated as "new appellate counsel," obligated to raise the claim on direct appeal, are not easily settled.

In practice, the Second Circuit's rule produces no increase in efficiency. It simply substitutes a difficult default rule for a substantive rule in some cases and in others requires resolution of both questions, often doubling the courts' work.

Finally, there is a paucity of good, practical reasons for forcing appellate counsel to raise an ineffectiveness claim in the court of appeals in the first instance, if, in counsel's judgment, it should not be brought there. None of the usual concerns with belated presentation of issues arising at trial are applicable, and there are no serious adverse consequences from adopting a rule permitting all ineffectiveness claims to be brought in proceedings under 28 U.S.C. § 2255 in the first instance.

ARGUMENT

I.

A Rule Permitting Any Claim of Ineffective Assistance of Counsel to Be Brought in a Proceeding Pursuant to 28 U.S.C. § 2255, with No Procedural Bar for Claims That Might Have Been Brought on Direct Appeal, Provides the Most "Orderly Appellate Procedure" for Resolution of Such Claims.

The Court faces a choice in this case between two procedural rules for the presentation and review of claims of ineffective assistance in the federal courts. The first is the bright-line rule that *Amici* support, that the failure to present an ineffectiveness claim on direct appeal does not violate any procedural rule in the federal courts and does not amount to a procedural default. *See United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995)(en banc); *United States v. DeRewal*, 10 F.3d 100, 101 (3d Cir. 1993). The alternative rule applied by the Second Circuit provides that a defendant must present a claim of ineffectiveness on direct appeal if he is represented by "new appellate counsel" and if "the claim is based solely on the record developed at trial," or alternatively, no further development of the record is "necessary." *Billy-Eko v, United States*, 8 F.3d 111, 115 (2d Cir. 1993); *see Guinan v. United States*, 6 F.3d 468, 472 (7th Cir. 1993) (if defendant postpones raising issue, he must have "valid reason," such as that trial counsel was appellate counsel, "claim could not be developed without new facts," or it "reasonably appeared that new evidence might be necessary"). The choice between these rules is governed by criteria of orderly appellate procedure, and *Amici* submit that the former rule is far superior in this regard, while the latter rule violates basic principles of orderly review and presents numerous practical disadvantages.

A. The Question Here, Concerning the Proper Procedure for Presentation of Claims of Ineffective Assistance of Counsel in the Federal Courts, Is One of "Orderly Appellate Procedure."

The procedural rule at issue here is easy to state in general terms. It consists of the truism that "habeas corpus will not do service for an appeal," *Sunal v. Large*, 332 U.S. 174, 178 (1947); *Adams v. United States ex rel. McMann*, 317 U.S. 269, 274 (1942), and it is the application of that rule to ineffective assistance claims that is in question. It is, however, not at all certain that the rule has any application to the presentation of ineffectiveness claims. Previously, indeed, the Solicitor General of the United States has taken the position that a direct appeal was not the proper forum in which to present claims of ineffective assistance of counsel and that they could be raised "*only* through a petition for post-conviction relief under 28 U.S.C. § 2255 ... because ineffective assistance claims are generally not properly in the District Court nor preserved for review on appeal." *United States v. Cronic*, 466 U.S. 648, 666 n.42 (1984) (emphasis supplied). The Solicitor General subsequently noted that there was "much to be said for a clear and uniform rule in this area" and that it was "the preferable result from the perspective of the federal criminal justice system" that defendants not be required to raise ineffectiveness claims on direct appeal. *See* Brief for the United States in *Billy-Eko v. United States*, No. 92-7897 at 7, 8. In light of these considerations, the Solicitor General concluded the failure to raise such a claim on appeal was not a procedural default. *Id.* at 7.

It is important, therefore, in applying the general rule that habeas may not "do service" for an appeal to this case, to determine what the underpinnings of that rule are. If they are the considerations of uniformity and efficient judicial administration that the Solicitor General found persuasive, then there is no substantial reason for requiring ineffectiveness claims to be presented in the first instance on direct appeal. *See Adams v.*

United States ex rel. McMann, 317 U.S. at 274 (rule based considerations of "orderly appellate procedure"). On the other hand, if the rule is grounded in the same considerations that lie behind contemporaneous objections rules at trial, emphasizing the importance of raising issues at the earliest moment, then presentation on direct appeal might be required. *Cf. Wainwright v. Sykes*, 433 U.S. 72, 88-90 (1977) (setting forth reasons for requiring "contemporaneous" objections at trial). Because the Court's decisions show that the rule that habeas may not "do service" for an appeal is grounded in concerns of efficient and orderly appellate procedure, *see Adams*, 317 U.S. at 274, a bright-line rule of the type the that the Solicitor General has previously advanced, which addresses such considerations, is the proper rule.

The modern rule that habeas corpus should not "do service for an appeal" was first articulated by the Court in *Adams v. United States ex rel. McMann*, 317 U.S. at 274. The rule had no statutory basis, but was adapted from earlier cases resting on common-law doctrines of the courts' jurisdiction under writs of habeas corpus and writs of error. *See id.*, citing *Glasgow v. Moyer*, 225 U.S. 420, 428 (1912)("writ of habeas corpus cannot be made to perform the office of a writ of error"); *In re Gregory*, 219 U.S. 210, 214 (1911)("Upon habeas corpus, the court examines only the power and the authority of the court to act, not the correctness of its conclusions.") Under the view of the earlier cases, there was little, if any, overlap between the federal courts' jurisdiction by writ of habeas corpus and their jurisdiction by writ of error, and a court simply had no jurisdiction to consider on habeas most issues that could be raised in error. *See In re Gregory*, 219 U.S. at 213-14 (collecting authority).[2]

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2. It may be doubted that the historic scope of habeas review was as narrow as the Court's language at this period would lead one to believe, see 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4d (4th ed. 2001),

When the Court in *Adams v. United States ex rel. McMann*, 317 U.S. 269, first set forth the modern rule that habeas should not "do service" for an appeal, it grounded the rule not on this jurisdictional basis, but rather on the need for "orderly appellate procedure," a concept it applied in a practical manner. *Id.* at 274. In *Adams*, the government contended that the court of appeals did not have jurisdiction to grant the writ of habeas corpus while an appeal presenting the same issue was pending. *Id.* at 272-73. This Court rejected the contention, and in the course of doing so observed, "Of course, the writ of habeas corpus should not do service for an appeal." *Id.* at 274. This rule, it went on, "must be strictly observed if orderly appellate procedure is to be maintained." *Id.* "Mere convenience," the Court continued, would not justify "resort to the writ as a substitute for an appeal," but, on the other hand, "dry formalism" should not prevent its use in appropriate cases, even where an appeal was available. *Id.* In the circumstances, the Court held, resort to habeas corpus was proper because the prisoner, representing himself, seemed unable to prepare the necessary bill of exceptions on the appeal unless it was submitted on the single point which the Circuit had entertained in habeas, which would have required him to forfeit his remaining claims. *Id.* at 274-75. At its origin, then, the rule in question here was one fundamentally of assuring "orderly appellate procedure" as a practical matter, not as a matter of "dry formalism."

A few years later, in *Sunal v. Large*, 332 U.S. 174, the Court reiterated that in the federal courts "the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal," but pointed out at some length that this was simply the "general" rule and was not applied inflexibly. *Id.* at 178.

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but it was against this conception of the relative roles of appeal and habeas that the rule of appellate procedure in question here arose.

The rule had been ignored, and the writ entertained "without consideration of the adequacy of relief by the appellate route," in a score or more of earlier cases involving varied issues *Id.* at 178-79 & nn. 6-8. On the other hand, the writ was not designed in general for review of ordinary "errors in trial procedure." *Id.* The rule that such issues could not be raised in habeas was "not one defining power but one which relates to the appropriate exercise of power;" it was not an "inflexible" rule. *Id.* at 180, quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). Since the case before it concerned an "error of law in excluding a defense" at trial, the Court held, the "regular, orderly method" for presenting the claim was by appeal and certiorari,[3] lest defendants repetitively raise claims, and criminal litigationn

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3. The Court has since directly applied the rule that habeas will not "do service" for an appeal in only one other federal case, a case that casts no light on the controversy here. In *Bousley v. United States*, 523 U.S. 614, 621 (1998), the Court held that a petitioner challenging the validity of his guilty plea had to do so first on direct appeal because "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *Id.*, quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979). In two other cases, involving post-conviction attacks on guilty pleas or sentences, the Court has relied on the doctrine to support holdings that the errors alleged were not sufficiently grave to support relief under § 2255. *See Timmreck*, 441 U.S. at 784; *Hill v. United States*, 368 U.S. 424, 428-29 (1962). And in *United States v. Benchimol*, 471 U.S. 453 (1985)(*per curiam*), the Court reached the merits of a challenge under § 2255 to the validity of a guilty plea, although one Justice would have held simply that there was no reason to let the post-conviction motion do service for an appeal. *See*, 471 U.S. at 457 (Stevens, J., concurring). None of these cases addresses the kinds of considerations that are present with respect to a claim of ineffective assistance of counsel, discussed more fully below.

become "interminable." 332 U.S. at 181-82.[4]

The procedural rule in question here is, therefore, a rule to provide "orderly appellate procedure," *Adams*, 317 U.S. at 274, and the question before the Court is what is the most "regular, orderly method," *Sunal*, 332 U.S. at 181-82, for adjudication of claims of ineffective assistance of counsel in the federal courts. In answering this question, it is important to consider that significant policies requiring, in the context of trial procedure, that claims be raised at the earliest possible moment are not present here. Thus, a bright-line rule permitting ineffective assistance claims to be raised following direct appeal does not implicate the kinds of powerful considerations that this Court articulated in cases such as *Davis v. United States*, 411 U.S. 233 (1973), and *Wainwright v. Sykes*, 433 U.S. 72 (1977), concerning contemporaneous objection rules applicable at trial.[5]

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4. The concern about "interminable" litigation has been addressed by recent legislation. The circumstances under which a federal prisoner may now bring a second motion under 28 U.S.C. § 2255 are severely limited: the discovery of new evidence that proves that the verdict could no longer be sustained, or the adoption by this Court of a new rule of constitutional law applicable retroactively to the prisoner's case. 28 U.S.C. § 2255. The prisoner's ineffectiveness claim will, accordingly, have to be brought within a year of his conviction, along with any other claims he might have, and there are no practical concerns with excessive litigation even if the ineffectiveness claim is not brought on direct appeal. *Cf. United States v. Galloway*, 56 F.3d at 1243 ("doctrines of successiveness and abuse of the writ ... prevent further attempts to litigate ineffectiveness claims after the first petition").

5. Since this is a federal case, moreover, the considerations of federalism, comity and "independent and adequate state grounds" involved in challenges to state convictions under 28

Most of the Court's more recent procedural default jurisprudence has its origin in the enforcement of contemporaneous objection rules in criminal trials, rules designed to make parties raise objections at the earliest opportunity. The Court has examined the rationale for such rules and the reasons for according them deference, but those reasons have little relevance to the questions of appellate procedure raised here. In *Davis v. United States*, 411 U.S. 233, where the Court first adopted the requirement that "cause" be shown to excuse a procedural default, the Court considered a specific requirement of Rule 12(b)(2) of the Federal Rules of Criminal Procedure that challenges to the composition of the grand jury or to the indictment be raised "before trial" in the absence of "cause shown." *Id.* at 236. It was important to enforce such rules strictly, the Court said, because if the rule was followed, "inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses and the parties have gone to the burden and expense of a trial." *Id.* at 241. On the other hand, if the rule were not strictly enforced, the defense would have "little incentive" to comply with it, since raising the objection might simply result in a new, valid indictment, and strong tactical considerations might make counsel delay raising the claim to use later as a basis to upset a conviction. *Id.*

This rationale is extremely strong in its context, but is

U.S.C. § 2254 are not present. Here, the Court's duty is to determine what the procedural rules in the federal courts are, and whether there has been a violation of such a rule. In cases arising under § 2254, the federal courts must accept the rulings of state courts as to state procedures. Thus, in such cases, if a state court required ineffective assistance claims to be raised on direct appeal, this Court would in most circumstances be bound by the rule, unless cause and prejudice for violating the rule were shown. Here, however, in the first instance, the Court must decide what is the federal procedural rule, not whether to defer to the established rule of a state court.

relevant only to the trial situation and has no application to the questions of appellate procedure in this case. While the deliberate failure to raise an issue at trial prevents an error being corrected, and in effect inserts an error in the proceeding to be raised on appeal, the failure to raise a claim on appeal confers no such strategic advantage. Thus, the strongest reason for insisting on the earliest possible presentation of claims and imposing strict default rules is not relevant here.

The Court enumerated several other, similar grounds for strict enforcement of contemporaneous objection rules in *Wainwright v. Sykes*, 433 U.S. at 88-90, but to the extent those grounds apply here, they support the view that claims of ineffectiveness should first be presented in the district court. Among the "interests which [a contemporaneous objection rule] serves in its own right," the Court said, is that it "enables the judge who observed the demeanor of [the] witnesses to make the factual determinations necessary for properly deciding the federal constitutional question." *Id.* at 88. But forcing ineffective assistance claims to be asserted on direct appeal would contravene this interest by taking the question away from the very judge who observed counsel's performance first-hand and, instead, put the burden on appellate courts to make factual and legal findings in the first instance. This is directly contrary to most concepts of orderly procedure. *See id.*

The only other rationale the Court set forth in *Wainwright* that is partially relevant to appellate procedures is that requiring early presentation of claims "enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding." *Id.* at 88. Permitting ineffective assistance claims to be raised in a motion under § 2255 does not seriously affect this interest. First, the only ineffectiveness claims that can ever be brought on direct appeal are those that are largely, or entirely, shown on the written record of the case and in which making the record and the "recollections of witnesses" are of diminished significance. The delay in

presenting such a claim is of far less consequence than the same delay in presenting claims depending on testimony extrinsic to the trial, which are permitted by their nature to be delayed until the § 2255 stage. *Waley v. Johnston*, 316 U.S. 101, 103 (1942). Ironically, therefore, the rule the Second Circuit applied in this case bars claims as to which delay poses the least serious problem, but permits bringing claims more likely to be affected by delay. From the standpoint of delay, there is no substantial reason to treat claims based largely on the trial record any differently from claims based on extrinsic evidence.

In addition, recent changes in the law have limited the degree to which "delay" is significant in motions under 28 U.S.C. § 2255. No longer can such a proceeding occur "years later," as the Court in *Wainwright* feared. 433 U.S. at 88. A defendant now generally has one year after his conviction becomes final in which to present his claims under § 2255. 28 U.S.C. § 2255 ("A 1-year period of limitation shall apply to a motion under this section.") Thus, a rule permitting ineffectiveness claims to be raised initially on habeas does not significantly implicate this concern.

The remaining rationales set forth in *Wainwright* have no application at all here. For the most part, these recapitulate the Court's reasoning in *Davis* that requiring contemporaneous objections permits potential errors to be cured at an early stage and eliminates the possibility that counsel will deliberately permit an error to occur in order to provide an appellate issue in the event of a conviction. *See Wainwright*, 433 U.S. at 88-90. As noted above, these concerns have no relevance in the present context. Nor, finally, does permitting the issue of ineffective assistance to be raised initially on habeas "detract from the perception of the trial of a criminal case ... as a decisive and portentous event," the final concern the Court voiced in the contemporaneous objection context. *Id.* at 90. The decision whether to permit the issue of ineffective assistance to be raised initially on habeas has no effect on the conduct of the trial and involves only considerations of judicial efficiency and orderly

appellate procedure.

In conclusion, while rules requiring procedural default are commonly said to further the desirable end of "finality," *see Wainwright*, 433 U.S. at 88, in this context, speaking of "finality" by itself simply begs the question for decision. The question in this case, after all, is to determine at what point a conviction should be deemed "final" with respect to a claim of ineffective assistance of counsel, based on considerations of orderly procedure. The Solicitor General previously concluded that convictions need not be deemed "final" with respect to any such claim, until after consideration of a motion pursuant to 28 U.S.C. § 2255. Invocation of the red herring "finality" should not distract the Court from the actual question here, determining what rule of procedure provides for the most "regular, orderly method" of presenting and resolving ineffectiveness claims. *Sunal v. Large*, 332 U.S. at 181-82.

B. The Most Orderly and Efficient Procedure for Litigation of Claims of Ineffective Assistance of Counsel Is to Permit All Such Claims To Be Brought for the First Time on Motions Pursuant to 28 U.S.C. § 2255; There Is No Significant Interest Supporting the Alternate Rule Applied by the Second Circuit.

Amici contend that, for many reasons, a rule permitting all ineffectiveness claims to be brought in the district court under § 2255 provides for the most orderly presentation of such claims. This procedure comports with the usual rule that appellate courts should review only claims already passed on by the trial court and also insures that review will occur upon a complete record including, in a matter of particular interest to *Amici*, evidence from counsel charged with ineffectiveness. In addition, in operation, the rule forcing some ineffectiveness claims to be raised on direct appeal has a number of undesirable consequences for the judicial process, including creating unfair traps for counsel and defendants, encouraging the presentation of appellate claims that either cannot be decided on direct appeal

or are better presented on motions in the district court, altering the usual function of appellate counsel, damaging the necessary cooperation between new appellate counsel and trial counsel, and unnecessarily complicating litigation. Against these compelling arguments, the argument that an ineffectiveness claim must be raised "at the earliest feasible opportunity," *Billy-Eko v. United States*, 8 F.3d at 115, amounts to the kind of "dry formalism" that this Court rejected early on, *Adams*, 317 U.S. at 274, and should continue to reject here.

Even those courts that require some ineffectiveness claims to be presented on direct appeal acknowledge that their rule "violates the principle that an issue not raised in the district court ... cannot be raised in the court of appeals." *Guinan*, 6 F.3d at 465. This Court has recognized the importance of this principle in the application of procedural default rules, and stated that such rules should encourage the presentation of claims in the first instance to the trial court familiar with the case, not to a reviewing court. *Wainwright v. Sykes*, 433 U.S. at 88. The principle is of considerable practical importance in the ineffective assistance context. The trial judge is in by far the best position to assess the effectiveness of counsel and to evaluate the reasons for counsel's actions. *See, e.g., Eubanks v. United States*, 11 F. Supp. 2d 455, 464 (S.D.N.Y. 1998) (district court rejects claim of inadequate cross-examination based on its own observations). Committing the ineffectiveness decision in the first instance to the trial judge often simplifies the entire question. In many cases, a simple factual finding makes it clear that counsel did not act unreasonably, essentially ending the litigation. In others, even where it appears that counsel acted unprofessionally, the judge who witnessed the proceedings can best address the claim that the defendant was prejudiced by counsel's conduct. Indeed, where the claim is that, had defense counsel acted properly, the court would have acted more favorably to the defendant, the court's own assessment of prejudice is definitive. *United States v. Aroworade*, 1999 WL 1206625 (N.D. Ill. Dec. 13, 1999) (failure to make motion for sentencing departure did not cause prejudice, since court would

have imposed same sentence in any event); *Lamberti v. United States*, 1998 WL 118172 at *3 (S.D.N.Y. March 13, 1998) (asserted ineffectiveness would have had no effect on sentence). Committing these issues to the court that tried the case in the first place invariably simplifies their resolution and simplifies appellate review, where it does not obviate that review altogether. Thus, "even if the record appears to need no further development, the claim should still be presented first to the district court in collateral proceedings ... so the reviewing court can have the benefit of the district court's views." *United States v. Galloway*, 56 F.3d at 1240.

The other prerequisite for orderly appellate review is an adequate record. Most ineffectiveness claims are based on alleged sins of omission, not sins of commission, and the record will not show counsel's reasons for failing to do something. Even where the claim is based on some apparently unjustifiable, and apparently prejudicial, act of counsel reflected in the record, the record will not show whether counsel was trying to avoid some even worse alternative, whether the client himself wanted the action taken, or whether there were other off-the-record justifications for counsel's action. Such factors should be considered, but are rarely evident on a trial record. Nor is it necessarily clear from the record itself whether there are additional factors, off the record, that are relevant to the claim. Ineffective assistance claims should thus be heard initially in proceedings in the district courts, since in that forum "at the very least counsel accused of deficient performance can explain their reasoning and actions." *Galloway*, 56 F.3d at 1240.[6]

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6. As a general matter, even the Second Circuit has agreed that counsel ought to be heard on these questions. *See McKee v. United States*, 167 F.3d 103, 108-09 (2d Cir. 1999) (finding counsel's failure to raise claim prejudicial, but remanding for counsel to be heard on question of effectiveness); *Sparman v. Edwards*, 154 F.3d 51, 51 (2d Cir. 1998) ("a district court facing the question of constitutional ineffectiveness of counsel

It is *Amici's* position, moreover, that defendants should not be punished for bringing ineffectiveness claims in § 2255 proceedings, since that is the place where the record can be made complete by giving trial counsel a full opportunity to be heard on the question of his competence. The courts seem not to have recognized that trial counsel have a substantial interest in such proceedings. A determination that a trial lawyer has been ineffective may entail serious consequences for that lawyer. Disciplinary proceedings are not infrequently commenced following such a finding. *See, e.g., In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (Ariz. 1993); *Florida Bar v. Sandstrom*, 609 So. 2d 583 (Fla. 1992); *In re Lewis*, 445 N.E.2d 987 (Ind. 1983); *In re Agrillo*, 194 A.D.2d 16, 604 N.Y.S.2d 171 (App. Div. 1993); *Office of Disciplinary Counsel v. McKinney*, 668 S.W.2d 293 (Tenn. 1984); *In re Disciplinary Proceedings Against Dumke*, 248 Wis. 2d 704, 635 N.W.2d 594 (2001). A lawyer found ineffective may lose eligibility for appointment as counsel in criminal cases. *See Rules of the United States District Courts for the Southern and Eastern Districts of New York, Appendix J: Plan for Furnishing Representation Pursuant to Criminal Justice Act of 1964*, ¶ III(F) (CJA Panel member may be removed "whenever the Board of Judges determines that the member has failed to fulfill the obligations of Panel membership or has engaged in other conduct which renders it inappropriate that he or she be continued as a Panel Member"). And the publication of such a finding may seriously affect the lawyer's livelihood, since members of the public may hesitate to seek the services of a lawyer labeled incompetent. Given these consequences, and the possibility that trial counsel may well have a justification not apparent on the record for his conduct, the applicable procedural rules should encourage ineffectiveness

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should, except in highly unusual circumstances, offer the assertedly ineffective attorney an opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs").

claims to be brought in proceedings where trial counsel has a full opportunity to be heard.

This is not solely for counsel's benefit, but also to permit the most thorough consideration of claims. It may well happen that what counsel says will clarify whether his performance has been adequate and even show a defendant's entitlement to relief, making proper resolution of the issue clear. *See, e.g., United States v. Quiroz*, 2002 WL 31422892 (D. Kan. Oct. 24, 2002) (where attorney sent letter to client incorrectly stating sentence client faced and testified that thereafter he never gave the correct information, ineffectiveness found).

The basis for defense counsel's actions can be determined most accurately, moreover, when he can give evidence in proceedings in which he no longer represents the defendant. When a client complains of counsel's performance during trial, counsel is placed in an extremely difficult position and does not have a full and adequate opportunity to explain his actions. The conflicting imperatives of getting on with the trial, trying to act in the client's best interests and not harm the case, and yet not being thought ineffective, may lead counsel to defend himself with less forcefulness than he could once representation has ceased and the trial is over. In general, therefore, even though counsel may have addressed some of the defendant's complaints on the record, the record may nonetheless not be complete concerning the basis for his actions or omissions. Those claiming ineffectiveness should not be deterred by default rules from bringing their claims in the forum where counsel may best explain his conduct.

Not only does the rule requiring ineffectiveness claims to be brought on direct appeal depart from the most orderly course of review, but it places inappropriate burdens on the appellate process as well. First, the rule makes it difficult for defense counsel to determine when to raise issues on appeal and creates traps for litigants. Second, because of this difficulty, and to avoid being faulted for a failure to raise a claim, counsel often

present claims on direct appeal that should not be presented there. And third, the rule interferes with the work of newly assigned or retained appellate counsel in completing his primary task, reviewing the trial record and preparing arguments based on it.

The first problem with application of the Second Circuit's default rule is that it has been difficult to apply and has borne out the Solicitor General's argument for a "clear and uniform rule in this area, so that appellate counsel, ... will not have to speculate about whether an ineffective assistance claim is properly presented on direct appeal." Brief for the United States in *Billy-Eko v. United States*, No. 92-7897 at 7-8. The rule, requiring claims that are "based solely on the record developed at trial" or in which additional evidence is not "necessary" to be brought on direct appeal, *Billy-Eko v. United States*, 8 F.3d at 115, has turned out not to be predictable in its application. In this very case, for example, the claim that defense counsel refused to let petitioner testify was held to be defaulted, *Massaro v. United States*, 27 Fed. Appx. 26, 30-31 (2d Cir. 2001), even though most counsel would assume that such a claim could hardly be made out without resort to off-the-record evidence showing what counsel said and why it kept petitioner from testifying, and thus that it would have to be presented in a motion under § 2255. The depth of the possible confusion is underlined by the fact that the government itself argued below that the claim was not defaulted, *id.* ("government agrees with Massaro" that claim not procedurally barred), demonstrating that the default rule is unclear and places an unacceptable burden on new appellate counsel.

The enforcement of the rule in the Second Circuit is rife with such contradictions, and they put appellate counsel in the difficult situation facing a choice of default on one hand or possible affirmance on an inadequate record on the other. *See United States v. Guinan*, 6 F.3d at 472 (default rule "hands appellate counsel a nasty dilemma"). It seems obvious, for example, that the claim that counsel was ineffective in failing to

call specific witnesses to the stand could not properly be decided on direct appeal, since what such witnesses would say, and what effect their testimony might have is nowhere on the record. *See, e.g., Susana v. United States*, 1994 WL 577722, at *2 (S.D.N.Y. Oct. 19, 1994) (such claim not barred because "who the witnesses were, what the substance of their testimony at trial would have been, and how that testimony would have shaped the outcome of the case" not on record). But in numerous cases, the courts of the Second Circuit have found just this kind of claim to be procedurally barred because it was not presented on direct appeal. *See, e.g., Moskowitz v. United States*, 2002 WL 31119269 (S.D.N.Y. Sept. 24, 2002); *James v. United States*, 2002 WL 1023146, at *6 (S.D.N.Y. May 20, 2002); *Peets v. United States*, 55 F. Supp. 2d 275, 277 (S.D.N.Y. 1999); *Grice v. United States*, 1998 WL 743718, at *2 (N.D.N.Y. Oct. 15, 1998).

That this poses a trap for the unwary, and, indeed, for the wary as well, is demonstrated by *Saldarriaga v. United States*, 2002 WL 449651 (S.D.N.Y. March 21, 2002). Saldarriaga claimed in his § 2255 motion that his counsel had been ineffective in not calling a witness at trial and in not submitting into evidence an affidavit from this witness attesting to his innocence. *Id.* at *2. Saldarriaga had repeatedly asked his appellate counsel to present this issue on appeal, and counsel, in five separate letters, had quite reasonably assured him that "the record does not support such a claim" and that "[a] claim of ineffective assistance of counsel is particularly appropriate in a 2255 motion where you can expand the record." *Id.* at *3. The district court held, nonetheless, that the claim was barred since it could have been presented on direct appeal, and it went on to chide appellate counsel for giving his client "misleading legal advice," while finding concurrently that such advice did not present "cause" for the failure to appeal. *Id.*[7]

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7. As an empirical matter, therefore, the Second Circuit's optimism that deciding whether to raise issues on appeal would

Second, beyond this inherent unfairness, the "uncertain lines" of the rule, Brief for the United States in *Billy-Eko*, at 7-8, have a second set of deleterious results for the federal criminal justice system. Given the rule's uncertainty, appellate counsel will, to avoid criticism or even a disciplinary charge, raise claims on direct appeal that ought properly to be brought in a motion under § 2255. As the Tenth Circuit observed in abandoning its former default rule: "The threat of default and resulting procedural bar has doubtless resulted in many claims being asserted on direct appeal only to protect the record." *Galloway*, 56 F.3d at 1241. The Second Circuit has acknowledged that its rule produces just this effect. *United States v. Workman*, 80 F.3d 688, 701 (2d Cir. 1996) (appellant's "decision to raise this claim on direct appeal ... is apparently driven by" the default rule in *Billy-Eko*). Indeed, the Second Circuit explicitly encourages new appellate counsel to submit claims in the court of appeals that counsel believe do not belong there. *See Billy-Eko*, 8 F.3d at 116 ("Even if new appellate counsel determines there is need for further extrinsic evidence, counsel would still be well-advised to err on the side of inclusion on direct appeal."). Raising these claims prematurely "unnecessarily burdens both the parties and the court." *Galloway*, 56 F.3d at 1241. Raising claims unnecessarily in the court of appeals may, in addition, constitute a "grave disservice" to the defendant if the court of appeals decides to reach the question, "because the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution." *Guinan v. United States*, 6 F.3d at 476 (Easterbrook, J., concurring). A rule that encourages counsel to raise claims the court cannot decide, at some risk to his client, is at best a pointless waste of counsel's and the court's time and at worst an unfair trap for

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not be "a difficult burden to bear," and that appellate counsel would not have to be "soothsayers" to do it, has turned out to be entirely unwarranted. *Billy-Eko*, 8 F.3d at 115.

litigants. The true test of a rule of procedure is whether it "induce[s] litigants to present their contentions to the right tribunal at the right time." *Guinan*, 6 F.3d at 474 (Easterbrook, J., concurring). The Second Circuit's rule in this case fails this test miserably.

The rule has a third set of unfortunate consequences for appellate procedure that are evident to the defense bar, but have not been noted by the courts. First, it interferes with the work of new appellate counsel appointed to a case. The primary task of a lawyer newly appointed to an appeal is to learn a record with which he is not familiar and to do so expeditiously given deadlines for preparing an appendix and filing the brief. Under the Second Circuit's rule, counsel may have to spend time that should be devoted to the actual record in investigating whether there is off-the-record evidence of a claim of ineffectiveness or whether the claim must be presented on the direct appeal. In addition, that very investigation may deprive counsel of an important resource in preparing the appeal, the full cooperation of trial counsel. Trial counsel's information is often essential to the appeal, since there are commonly aspects of the case not readily apparent in the transcript that can help determine whether a potential appellate issue has good prospects or is fatally flawed. Once trial counsel learns of the potential of an ineffectiveness claim, however, he is apt to be far less forthcoming than otherwise. This may adversely affect counsel's choice or presentation of issues on the appeal, a result that serves neither the defendant nor the court well. It is *Amici's* view that it is a far better system to let appellate counsel deal with the quintessentially appellate issues on the record and to remit issues of ineffectiveness for presentation in the trial court under § 2255.

Adoption of a default rule does not, moreover, even have the virtue of simplifying litigation. As a preliminary matter, if this Court adopts such a rule, further, difficult questions will have to be answered. Those questions include: (1) whether the existence of *any* relevant extrinsic evidence avoids default, or

only material or "necessary" evidence, as the Second Circuit seems to hold, *Billy-Eko*, 8 F.3d at 115, or simply new appellate counsel's belief that such evidence exists, *see Guinan*, 6 F.3d at 472 ("reasonably appeared that new evidence might be necessary"); (2) whether if there are multiple allegations of ineffectiveness, some of which appear on the record, all claims may be brought pursuant to § 2255, the claims must be severed, or all must be brought on direct appeal, *see Galloway*, 56 F.3d at 1240-41; *Guinan*, 6 F.3d at 473; and (3) who qualifies as "new appellate counsel" -- a different appellate lawyer in the same law firm or Federal Defender's Office, a lawyer who like the trial lawyer, works in the Office of a Federal Defender, but in a different district, an appellate lawyer in private practice who shares space with the trial lawyer, a lawyer who works together with the trial lawyer regularly as appellate counsel, or only a completely independent lawyer? *See Jones v. United States*, 2002 WL 188355 at *6 (S.D.N.Y. February 6, 2002) (holding that lawyer was "new appellate counsel" even if trial and appellate counsel worked together and trial counsel assisted appellate counsel to "some degree" in preparing the appeal).[8] Permitting all ineffectiveness claims to be brought in § 2255 proceedings avoids these legal thickets.

Adopting this bright-line rule simplifies litigation in

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8. In fact, both lawyers in question in *Jones* were, at the time of Jones's November, 1992, trial, fellow employees of the Federal Defender Services Unit of The Legal Aid Society of New York City. *See*, dates and appearances of counsel in *United States v. Diaz-Collado*, 981 F.2d 640, 641 (2d Cir. 1992); *United States v. Fares*, 978 F.2d 52, 54 (2d Cir. 1992); *United States v. Pichardo*, 1992 WL 249964 (S.D.N.Y. September 22, 1992); *United States v. Baviello*, 1993 WL 120048 (S.D.N.Y. March 10, 1993). To require one lawyer in a Federal Defender's Office to argue that his colleague rendered ineffective assistance, as *Jones* appears to, would be intolerable.

other ways, for, as the Tenth Circuit has recognized, a default rule increases rather than decreases litigation. *Galloway*, 56 F.3d at 1242 (question of procedural bar "embroils us in nonmerits issues which are as time-consuming as if we went straight to the merits, and infinitely less productive"); *see Guinan*, 6 F.3d at 474 (Easterbrook, J., concurring) ("Far from simplifying and expediting the process of resolving ineffective-assistance claims, the [default rule] complicates and extends it.") The bright-line rule presents courts with a single issue for decision, the question of ineffectiveness. The default rule substitutes an equally difficult procedural issue for the ineffectiveness issue in some cases, but in many cases requires the court to decide *both* issues. As the Tenth Circuit held, "[t]he simple, most direct approach best serves the judicial process," *Galloway*, 56 F.3d at 1242, and this Court should adopt it.

Finally, the interests that support a default rule are comparatively meager. They consist largely of the bare notion that "defendants should raise their claims of ineffective assistance at the earliest feasible opportunity," *Billy-Eko*, 8 F.3d at 115, or that their "delay should not be countenanced." *United States v. Taglia*, 922 F.3d 413, 418 (7th Cir. 1991). At best, these rationales are the kind of "dry formalism" that the rule here is supposed to avoid, *Adams v. United States ex rel. McMann*, 317 U.S. at 274, for they are not supported by any significant practical considerations. At worst, they are a mistaken imposition on the appellate process of policies that are appropriate primarily to trial proceedings. *See* pp. 11-15, *supra*. In any event, forcing claims to be brought too soon and in the wrong forum does no service to the judicial process, *Guinan*, 6 F.3d at 474 (Easterbrook, J., concurring). Accordingly, *Amici* contend that the Court should adopt the simple, bright-line rule of the Tenth Circuit in *United States v. Galloway*, 56 F.3d at 1242, that "claims of constitutionally ineffective counsel should be brought on collateral review, in the first petition filed under 28 U.S.C. § 2255," and that "[n]o procedural bar will apply to claims which could have been brought on direct appeal but were brought in post-conviction

proceedings instead." *Id.*

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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